

*February*

BEFORE THE  
POLLUTION CONTROL HEARINGS BOARD  
STATE OF WASHINGTON

IN THE MATTER OF  
KAISER ALUMINUM & CHEMICAL  
CORPORATION and SEATTLE  
STEVEDORE COMPANY,

Appellants,

v

PUGET SOUND AIR POLLUTION  
CONTROL AGENCY,

Respondent.

PCHB Nos. 1079 and 1085

ORDER GRANTING  
MOTION TO VACATE

These consolidated matters, appeals of a civil penalty (\$250.00) issued against appellants for failure to take reasonable precautions with particulate matter in violation of Regulation I, § 9.15(a) came on for formal hearing before the Pollution Control Hearings Board (W. A. Gissberg, presiding, and Chris Smith) at Lacey, Washington on February 10, 1977.

Appellant Kaiser Aluminum & Chemical Corporation was represented by Edward M. Lane; Jack P. Hogan, Director of Safety, represented

1 appellant Seattle Stevedore Company; respondent Puget Sound Air  
2 Pollution Control Agency was represented by its attorney Keith D.  
3 McGoffin.

4 At the close of respondent's testimony, appellant Kaiser Aluminum  
5 & Chemical Corporation, joined by appellant Seattle Stevedore Company,  
6 moved to dismiss the notice of violation and civil penalty on two  
7 grounds:

8 1) The agency, having the burden of establishing the violation,  
9 did not connect appellant Kaiser Aluminum & Chemical Corporation in any  
10 way with the subject emission, and

11 2) The agency did not establish all the necessary elements of  
12 the section of the regulation allegedly violated, i.e., it did not prove  
13 that the observed emission was particulate matter and not uncombined  
14 water.

15 Under the Board's rule, WAC 371-08-180(2) the agency imposing a  
16 civil penalty first proceeds with its case-in-chief. A prima facie  
17 case of violation must be established.

18 Regulation I, Section 9.15(a) provides:

19 It shall be unlawful for any person to cause  
20 or permit particulate matter to be handled,  
21 transported or stored without taking reasonable  
precautions to prevent the particulate matter  
from becoming airborne. . . .

22 While Kaiser's relationship with the alumina was not established,  
23 evidence was presented that appellant Seattle Stevedore Company was  
24 responsible for the handling of the alumina stored in the holds of the  
25 subject ship, SHOBU MARU.

26 Evidence was also offered by respondent that alumina as a substance

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1 can be particulate matter within the definition of Regulation I, Section  
2 1.07(w):

3 . . . "Particulate matter" means any material,  
4 except water in an uncombined form, that is or  
5 has been airborne and exists as a liquid or a  
solid at standard conditions. . . .

6 No evidence was presented by respondent that the emission observed  
7 by the agency's inspector rising from the hold of the ship was particulate  
8 matter, i.e., alumina, and was not water in an uncombined form.

9 The agency having failed to establish a prima facie case, appellants'  
10 Motion to Vacate the notice of violation and civil penalty is granted.

11 Had the agency been able to establish that an airborne emission was  
12 composed of particulate matter, the subject substance alumina, and  
13 not water in an uncombined form, a prima facie case that a particulate  
14 matter was being handled or stored without taking reasonable precautions  
15 to prevent its becoming airborne would have been established. That is,  
16 once an airborne emission of particulate matter is shown to exist, the  
17 burden of proceeding with evidence shifts to the appellant to show that  
18 reasonable precautions had nonetheless been taken to prevent such emissions

19 ORDER

20 The Notice of Violation No. 12417 and the Notice of Civil Penalty  
21 No. 2942 are vacated.

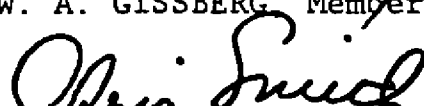
22 DATED this 22<sup>d</sup> day of February, 1977.

23 POLLUTION CONTROL HEARINGS BOARD

24 (Did not participate)  
25 ARTHUR BROWN, Chairman

26   
27 W. A. GISSBERG, Member

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CHRIS SMITH, Member

1                                    CERTIFICATION OF MAILING

2            I, LaRene Barlin, certify that I deposited in the United States  
3 mail, copies of the foregoing document on the 22<sup>d</sup> day of  
4 February, 1977, to each of the following-named parties at the last  
5 known post office addresses, with the proper postage affixed to the  
6 respective envelopes.

7                                    Mr. Keith D. McGoffin  
8                                    Rovai, McGoffin, Turner and Mason  
                                  818 South Yakima Avenue  
                                  Tacoma, Washington 98405

9                                    Mr. Edward M. Lane  
10                                   Johnson, Lane & Gallagher  
11                                   P. O. Box 1315  
                                  Tacoma, Washington 98401

12                                   Kaiser Aluminum & Chemical Corporation  
13                                   3400 Taylor Way  
                                  Tacoma, Washington 98421

14                                   Mr. Jack P. Hogan  
15                                   Director of Safety  
16                                   Seattle Stevedore Company  
                                  P. O. Box 24868  
                                  Seattle, Washington 98134

17                                   Puget Sound Air Pollution Control Agency  
18                                   P. O. Box 9863  
                                  Seattle, Washington 98119

19  
20  
21                                     
22                                   LARENE BARLIN  
                                  POLLUTION CONTROL HEARINGS BOARD

23  
24  
25  
26  
27    ORDER GRANTING  
         MOTION TO DISMISS